SCOTCH LEASING SDN. BHD.

v.

PERWIRA HABIB BANK (M) BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. C 3-31-252-1986]
29 APRIL 1987

COMPANY LAW: *Debenture - Whether void for want of execution and defective execution - Question of Bank officer's authority to execute deed of debenture on behalf of bank - Provision in document for crystallisation of the debenture and appointment of Receiver.*

COMMISSIONER FOR OATHS: *Oaths and affirmations - Attestation of the execution of Power of Attorney - Whether has power to attest execution of P/A - Courts of Judicature Act 1964.*

CIVIL PROCEDURE: *Originating summons - Whether oral testimony of witnesses could be adduced (controversy disclosed by affidavit).*

DAMAGES: *Undertaking of damages - Undertaking given by plaintiff in ex parte injunction application - Defendant's application to set aside ex parte injunctive order dismissed - Whether undertaking given by plaintiff during ex parte application still stands - Plaintiff's action dismissed.*

COMPANY LAW: *Receivership - If receivers and managers are appointed - Whether it will question credibility of plaintiff company - Petition to wind up plaintiff presented.*

The plaintiff caused the originating summons to be issued against the defendant, seeking a declaration (and orders consequential thereto) that the deed of debenture purported to have been executed by the plaintiff for the granting of overdraft facility for RM5 million null and voice for defective execution by the plaintiff and for want of execution by the defendant. Initially, the plaintiff had on an *ex parte* application obtained an injunction restraining the defendant from appointing receivers pending the disposal of the originating summons. The *ex parte* order was made on the usual undertaking having been given by the plaintiff. Thereafter, the defendant's application to have the injunction set aside and for damages to be assessed was dismissed but an early date for hearing of the originating summons was ordered.

The plaintiff purported to duly execute the deed of debenture by having its common seal affixed to it in the presence of two persons held out to be directors of the plaintiff both of whom signed the document to indicate that the seal was affixed in their presence. There was also a certificate by its solicitor En. Ng Yong Lee who certified that the common seal of the plaintiff was affixed to the document in his presence and that it was so affixed on 10 June 1985 in accordance with the plaintiff company's regulations. However, a director of the plaintiff had stated in his affidavit that by virtue of Article 130 of the Articles of Association as amended on 1 June 1985, the board of directors have no authority to affix the common seal of the company except in the presence of 3 directors of the company.

The defendant held out Mr. Alec Tan Cheong Tiong the senior manager of their central branch to be its attorney, by a power of attorney which had the common seal of the defendant bank affixed before a commissioner for oaths and the senior manager signed the document for and on behalf of the bank.

The issue before the Court was as to the validity of the deed of debenture.

Held:

[1] Since there was no effective power of attorney, authorising Alec Tan, the senior manager at all relevant times to execute the deed of debenture on behalf of the defendant bank, it is inarguable that there has been a purported or apparent delegation by the bank of its powers and duties in favour of Alec Tan *vis-a-vis* the execution of the deed of debenture.

[2] However, it is not for the plaintiff at this stage to raise the question of lack of proper delegation on the part of the defendant bank. The bank had held out Alec Tan as its agent to negotiate the overdraft facility to execute the deed of debenture. Thereafter, the defendant ratified what Alec Tan had done as can be seen from the fact that it allowed the plaintiff to draw on the facility.

[3] It had been held that where there is a controversy disclosed by affidavit the Court should hesitate in making findings of fact. It seemed to the Court that the plaintiff having initiated the proceedings by originating summons and having taken the matter this far had to sleep in the bed made by it. It cannot apply to have the matter heard in such a manner that the oral testimony of witnesses could have been obtained if only the defendant had cross-examined those deponents whose affidavit had been filed by the plaintiff.

[4] The affidavit evidence is overwhelmingly in favour of the finding of fact on a balance of probability that the amendment to Article 130 of the articles of association of the plaintiff company to affix the common seal of the company in the presence of 3 directors of the company instead of 2 directors was made after the deed of debenture was executed on the 10 June 1985 in the presence of the 2 directors.

[5] Upon the disposal of the substantive action if it is found that at the instance of the plaintiff a right of the defendant has been interfered with by means of an injunction the Court will direct its mind to the question of damages suffered by the defendant as a result thereof and may invoke the undertaking in damages given by the plaintiff that after the injunction had been imposed and before the trial of the substantive action had come up the defendant had sought but failed to have the injunction set aside makes no difference to the situation.

[6] The effect of the dismissal of that earlier application to have the *ex parte* injunction set aside is that the Court was of the opinion that *inter alia* in the face of the undertaking in damages given by the plaintiff there should be an injunction having in mind that in the event the plaintiff fails in the substantive action the defendant may fall back on the undertaking in damages in respect of any damages it may have suffered as a result of the injunction.

[7] It is a fact that there has been a petition to wind up the plaintiff presented. In any event *inter alia* with the petition and the notices published by the defendant in four newspapers in connection with the crystallization of the debenture and the present proceedings itself in open Court, it is incredulous that the question of the standing and credibility of the plaintiff company was raised. If ever anything was academic, that is.

[Originating Summons dismissed with costs.]

Cases referred to:

Biggerstaff v. Rowatt's Wharf Ltd. [1896] 2 Ch 93
Freeman & Lockyer v. Buckhurst Park Properties Ltd. [1964] 1 All ER 637
Royal British Bank v. Turquand 6 E & B 327
County of Gloucester Bank case [1895] 1 Ch 629
Duck v. Tower Galvanizing Co. Ltd [1901] 2 KB 314
Ushers Brewery Ltd. v. P.S. King & Co. (Finance) Ltd. [1972] 1 Ch 148
Newby v. Harrison [1861] 3 De GF & J 287
Griffith v. Blake [1884] 27 Ch D 474

Legislation referred to:
Commissioner for Oaths Ordinance No. 46 of 1947, s. 3

Other sources referred to:
Halsbury's Laws of England, Vol. 1, para. 749
Spry, 3rd Edn., p. 465

For the plaintiff - M.S. Murthi; M/s. Murthi & Partners
For the defendant - P.S. Ranjan (Renu S. Zechariah with him); M/s. Adam & Co.

JUDGMENT

VC George J:

Alec Tan Cheong Tiong was the senior manager of the central branch of the defendant bank from 8 January 1985. At all relevant times he continued to hold a senior position in the bank.

It would appear that on 6 June 1985 the bank wrote to the plaintiff a letter that was signed by Alec Tan referring to an application for credit facilities that had been made by the plaintiff and informing the plaintiff that their application had been approved subject to the terms and conditions set out in their letter of 6 January 1985. The facility was an overdraft for RM5 million. The plaintiff purported to confirm its acceptance of the offer by affixing its name stamp under the signature of two persons on the duplicate copy of the letter, which copy was then returned to the bank. On the same day the bank appears to have written another letter by which it varied one of the terms set out in the earlier letter. Again the plaintiff purported to confirm its acceptance of the variation by returning the duplicate of that letter to the bank, stamped with the stamp of the plaintiff under the hand this time of one person only.

I have said that these matters "appeared" to have been done or "were purported" to have been done because on behalf of the plaintiff it has been contended that a company may only act by its board or by an agent who had been duly appointed as such by a power of attorney. Such a startling contention is without any merit. A company has out of necessity to function through servants and agents and there is no general requirement that such servant or agent should have a power of attorney or even a letter of authority before he can act for and on behalf of the company. However, it could happen and there is nothing to stop it from happening that third parties dealing with the company may refuse to deal with a person held out to be a servant or agent of the company until they are satisfied that such person in fact has the authority he purports to have. One method of satisfying such third parties of the authority the person professes to have is to provide such servant or agent with a power of attorney.

There may be the odd statutory requirement (the Companies Act itself does not provide for any situation that calls for the company having to act by a grantee of a power of attorney) or a term in a contract, that a company should act by a grantee of a power of attorney but there is certainly no such general requirement.

The members of the board of directors of the plaintiffs proceeded on 10 June 1985 to move a circular resolution by which the board accepted the facility offered and authorised the affixing of the common seal on the documents relevant to obtaining the facility.

One of the terms and conditions for the granting of the overdraft facility was that the plaintiff issue a debenture in favour of the bank. On 11 June 1985 a deed of debenture was made available to the bank said to be "issued" pursuant to provisions in the memorandum and

articles of association and pursuant to "a resolution of the borrower passed on 11 June 1985". After the initial paragraph the format used for the document was the format of an agreement between the bank and the plaintiff save that by Article III of the document the borrower is seen to make a unilateral declaration "For better securing the payment of money and liabilities... the borrower hereby charges with the payment to the bank of all whatsoever moneys...so that the charge hereby created shall be a continuing security". This is followed by details of the fixed and floating charge created provisions for the bank to convert the floating charge into a fixed charge followed by various declarations made by the borrower. Later in the document are provisions for the crystallization of the debenture and for the appointment of a receiver and manager.

This document was designed for both the bank and the borrower to execute it.

The plaintiff purported to duly execute the document by having its common seal affixed to it in the presence of two persons held out to be directors of the plaintiff both of whom signed the document to indicate that the seal was affixed in their presence. The borrower also provided, on the document itself, a certificate by its solicitor Encik Ng Yong Lee who certified that the common seal of the plaintiff was affixed to the document in his presence and that it was so affixed on 10 June 1985 in accordance with the regulations of the plaintiff company.

The bank held out Alec Tan Cheong Tiong to be its attorney and he signed the document for and on behalf of the bank.

Shortly after, upon the solicitors having the conduct of the matter for the bank confirming that all the necessary documentation in respect of the facility had been duly attended to, the plaintiff was allowed to and did draw down on the facility commencing to do so from 25 June 1985. By August 1986 an amount in excess of RM5 million was owing by the plaintiff on the overdraft facility and it was imminent that the bank would crystallise the debenture and proceed with steps consequential thereto.

On 16 September 1986 the plaintiff caused the originating summons herein to issue seeking a declaration (and orders consequential thereto) that the deed of debenture is null and void for want of execution by the bank and defective execution by the plaintiff. An interlocutory injunction restraining the bank from appointing receivers was obtained pending the disposal of the originating summons.

In respect of the execution of the deed by the bank it is contended by the plaintiff that Alec Tan purported to do so pursuant to one or the other of two powers of attorney both dated 23 October 1985. It is however not disputed that neither of those powers of attorney *per se* had the effect of authorising Alec Tan to execute the deed on behalf of the bank, one having to be executed jointly with another officer of the bank (which was not done in this case) and the other having limited application to documents to be executed in the presence of officers of the land office. Alec Tan in his affidavit encl. (11) exhibited an earlier power of attorney dated 13 December 1984. However a close perusal of its contents convinced me that even this document does not authorise him to execute a deed of debenture other than for purposes limited by the earlier provisions of the power of attorney which does not include the granting of overdraft facilities.

For good measure Encik Murthi of Counsel for the plaintiff pointed out that the commissioner for oaths before whom the affixing of the common seal of the bank was effected on the power of attorney, has stated on the document that it was done on 3 December 1984 (and not 13 December 1984 which as has been seen is the date of the power of attorney).

However, the commissioner for oaths concerned has affirmed an affidavit pointing out that all indications on the face of the document are that it was executed by the donor in her presence on 13 December 1984 and date 3 December 1984 is incorrect and should read with 13 December 1984.

Encik Murthi also indulged in an interesting argument contending that the power given to a Commissioner for Oaths to attest the execution of powers of attorney has been repealed by implication in that, while the Commissioner for Oaths Ordinance No. 46 of 1947 had by s. 3 provided for a commissioner for oaths to make such attestations, that Ordinance had been repealed by the Courts of Judicature Act 1964 and provisions in the Courts of Judicature Act which provided for what a commissioner for oaths may do does not include the power to attest the execution of powers of attorney.

However, in view of the opinion I have arrived at, to the effect that the contents of the power of attorney of 13 December 1984 in fact did not provide authority for Alec Tan to execute a debenture to be issued in respect of an overdraft facility granted to a customer, I will not be drawn into an adjudication of those two other matters raised by Encik Murthi.

Now, although it has turned out that there was no effective power of attorney, authorising Alec Tan to execute the debenture on behalf of the bank, it is inarguable that there has been a purported or apparent delegation by the bank of its powers and duties in favour of Alec Tan *vis-a-vis* the execution of the deed of debenture. The learned editors of *Halsbury* have summarised the position in Vol. I at para. 749 thus:

> The powers and duties of directors cannot be delegated except in accordance with the articles of association of the company, Where, however, there has been a purported or apparent delegation in favour of a sub-agent and such delegation if duly made would have been within the scope of a power in the articles, any internal management irregularity will be disregarded in relation to those who deal *bona fide* with the sub-agent and without knowledge of such irregularity.

In the instant case there is no doubt at all that the delegation if duly made would have been within the scope of a power in the articles and accordingly the lack of any or any proper or properly created power of attorney should be disregarded.

In any event I am constrained to say that the whole of this part of the argument was completely misconceived. It is not for the plaintiff at this stage to raise the question of lack of proper delegation on the part of the bank. The bank had held out Alec Tan as its agent to negotiate the overdraft facility and to execute the deed of debenture. Thereafter the bank ratified what Alec Tan had done as can be seen from the fact that it allowed the plaintiff to draw down the facility. It was open for the plaintiff to have refused to deal with Alec Tan until they were satisfied that he was in fact the Bank's duly authorised agent but in the face of the bank holding that Alec Tan was at all relevant times its duly authorised agent the plaintiff cannot be heard now to insist that he was not. On the facts it would not have been possible even for the bank to have successfully denied that Alec Tan was its agent. Thus in *Biggerstaff v. Rowatt's Wharf Ltd.* [1896] 2 Ch 93, where the articles of association conferred power to appoint a managing director, the company was held bound by the act of a person who purported to contract as its managing director, though he had never been formally appointed as such. And in *Freeman & Lockyer v. Buckhurst Park Properties Ltd.* [1964] 1 All ER 637 @ 641, Pearson LJ approved the Judge of the Court of first instance applying *Biggerstaff* and said,

> In my view the decision of the Judge was correct. On the facts as found the plaintiffs were entitled to rely on the second defendant's ostensible authority to give them instructions on behalf of the defendant company, as its agent to conduct its business within the ordinary scope of that business. The expressions "ostensible authority" and "holding out" are somewhat vague. The basis of them, when the situation is analysed, is an estoppel by representation.

These two cases and I dare say all other reported cases challenging the authority of an agent to bind a company deal with the company concerned issuing the challenge. The question of a 3rd party who had dealt with the ostensible agent held out by the company to be its agent and not denied by the company of being its agent insisting that in fact the agent is not an agent, cannot arise in such a context.

The first ground on which the plaintiff relies is as I said misconceived and in any event is devoid of any merit.

The other ground on which the plaintiff relies, unlike the first ground, merits some consideration.

The contention is that the execution of the deed by the plaintiff on 10 June 1985 was defective. David Lim Yong Sai alias Maung Hong Kong, a director of the plaintiff, states in para. 13 and 14 of his affidavit encl. (3):

> 13. I have been advised and verily believe that by virtue of the Article 130 of the Articles of Association as amended on 1 June 1985, the board of directors have no authority to affix the common seal of the company except in the presence of 3 directors of the company.
>
> 14. A perusal of the deed of debenture clearly shows that the affixation of the common seal has only been witnessed by 2 directors and not by 3 as required by the amended Article 130.

As has been seen the common seal was indeed affixed in the presence of two directors and not three directors as required by the alleged amendment to Article 130.

By his further affidavit encl. (14) David Lim purports to explain how and when the amendment to Article 130 came about: Apparently in respect of the various companies controlled by his father Lim Kang Sooi, the provision for affixing of the common seal was for it to be done in the presence of two directors. In or about the month of May 1985 one of the companies in the group entered into a transaction that apparently caused that company to lose over a million ringgit. When Mr. Lim Kang Sooi, who apparently is in the position of the *Pater Familias* of the family and group, learnt on 1 June 1985 of the transaction and the loss, according to David Lim "there was a crisis in the group". As a result, Lim (Senior) apparently directed that the articles of the four property based companies in the group be amended so that three instead of two directors would have to be present for the affixing the common seal. He states that this explanation puts paid to the suggestion made on behalf of the Bank that the amendment of Article 130 was effected "to deliberately defeat the claim of the defendant bank."

David Lim exhibited to encl. (14) the relevant notices of the resolution (to be sent to the Registrar of Companies) giving notice of the amendment of the Article. In respect of the plaintiff the notice of resolution is seen to be dated 14 June 1985 and refers to an extraordinary general meeting (EGM) held on 1 June 1985. In respect of the other 3 companies involved the notices are dated 1 July 1985 and the relevant EGM is shown to have been held on 26 June 1985 in each case.

I enquired of Counsel when the relevant notice of resolution of the plaintiff dated 14 June 1985 was lodged with the Registrar. He took instructions and informed me from the Bar that by what appears to be a coincidence the notice of resolution of the plaintiff was lodged on 27 June 1985.

We have already seen the certificate of the advocate & solicitor on the debenture. We also have the fact of only two directors being present when they purported to duly affix the common seal to the debenture. There is also an affidavit sworn by David Lim on 11 June 1985 stating that he was present and did see the seal of the company being duly affixed to the debenture. Now, it was David Lim and Lim Kang Sooi who attended to and witnessed the affixing of the common seal only 9 days after the crisis that resulted in one of the companies losing over RM1 million that resulted, according to David Lim, in the amendment to Article 130. It seems that these worthy gentlemen completely ignored the crisis and the orders of the *Pater familias* and the amended Article 130 all of which had taken place only 9 or 10 days earlier. They allowed their solicitors to issue a false certificate and David Lim affirmed a false affidavit!

Now on 11 June 1985 the secretary of the company prepared and lodged with the Registrar of Companies particulars pertaining to the change of company secretary which took place on 1 June 1985 (which is the date the amendment to Article 130 was said to have been effected). If such an important amendment (to Article 130) had been effected on the same day as the change of secretaries had taken place the obvious question that arises is why when on 11 June 1985 the secretary had directed her attention to lodging with the Registrar information in respect of changes taking place in the company the amendment to Article 130 was not included.

Encik Ranjan of Counsel for the bank submitted with justification that Ms Chua, the secretary should have explained this and in the absence of any or any acceptable explanation an adverse inference has to be drawn.

I have also considered the letter the solicitor Ng Yong Lee received from David Lim, David Lim's explanation in respect of that letter and Ng's version of what had happened. A significant omission on the part of the plaintiff in general and David Lim and Lim Kang Sooi in particular is an explanation as to why only two of them turned up for the affixing of the common seal.

It has been held that where there is a controversy disclosed by affidavit the Court should hesitate in making findings of fact. However, in respect of this matter which could very well have been brought by way of a writ, the plaintiff who has the conduct of the matter choose to go by originating summons. No doubt Encik Murthi did attempt towards the end of the hearing after the Court had heard lengthy submission, to apply to have the matter heard in such a manner that the oral testimony of witnesses could be adduced but it seemed to me that the plaintiff having initiated the proceedings by originating summons and having taken the matter this far had to sleep in the bed made by it. In the circumstances, I had to make the best of the affidavit evidence which did not give me any particular problems since in my judgment the evidence is overwhelmingly in favour of the finding of fact on a balance of probability that the amendment to Article 130 was made after the debenture was executed on 10 June 1985. In fact the probabilities are that it was made together with the resolutions passed in respect of the other 3 companies, on 26 June 1985. It seems to me that in all probability it was at that stage decided to predate the date of the amendment to 1 June 1985 with the deliberate intention of having an ace in hand to utilise to defeat the bank's right to crystallise the debenture and appoint a receiver and manager, if and when the need to utilise it should arise.

In any event, on the principles explained in *Royal British Bank v. Turquand* 6 E & B 327 and *County of Gloucester Bank case* [1895] 1 Ch 629 and reiterated in *Duck v. Tower Galvanizing Co. Ltd.* [1901] 2 KB 314, I hold that the debenture was duly executed by the plaintiff. I hold that it is valid and subsisting.

The originating summons (OS) is dismissed with costs.

At the outset Counsel had informed the Court that in respect of OS 31-253-86 and OS 31-254-86 each taken out by sister companies of the plaintiff in the instant case (OS 31-252-86) and in which the defendant is the bank and which were called for hearing at the same time as OS 31-252-86, the parties would abide by the decision arrived at in OS 31-252-86.

In OS 31-253-86 the only point taken by the plaintiff was that Alec Tan who had executed the debenture on behalf of the bank did not have an effective power of attorney. The relevant facts and the arguments are similar to that in OS 31-252-86. The OS has to be and is dismissed with costs.

In OS 31-254-86 the debenture was executed only by the plaintiff company that had issued it. Although it was designed for the bank to execute it no such execution took place. However, in view of the understanding arrived at by Counsel with the approbation of the Court at the outset and in any event since in this case as well, as the bank had allowed the facility to be utilised after the plaintiff had "issued" the debenture and it was utilised, the originating summons is also dismissed with costs.

Two other matters came up.

The first was the question of damages that may have been suffered by the defendant as a result of the interlocutory injunction. That order was made on the usual undertaking in damages having been given by the plaintiff. Initially the plaintiff had obtained the restraining order on an *ex parte* application. The defendant sought to have the injunction set aside and for damages to be assessed. Their application was dismissed but an early date for hearing of the originating summons was ordered. Encik Murthi contended that since the defendant's application to set aside the orders was dismissed the undertaking in damages ceased to obtain and that in any event having failed to have the injunction set aside even if the defendant had suffered damages the plaintiff should not be liable for it.

In seeking the injunction that the plaintiff had obtained in effect the plaintiff was contending that it would eventually succeed in the substantive action and that accordingly the defendant ought to be restrained from proceeding with any steps inconsistent with the anticipated result in the substantive action. The question that then arose was this: "What if in fact the plaintiff fails in the substantive action and in effect the defendant had been restrained from doing what it was entitled to do?" It is to meet such a contingency that the plaintiffs are required to provide the undertaking in damages. Accordingly upon the disposal of the substantive action if it is found that at the instance of the plaintiff a right of the defendant has been interfered with by means of an injunction the Court will direct its mind to the question of damages suffered by the defendant as a result thereof and may invoke the undertaking in damages given by the plaintiff. That, after the injunction had been imposed and before the trial of the substantive action had come up the defendant had sought but failed to have the injunction set aside makes no difference to the situation. The effect of the dismissal of that earlier application to have the *ex parte* injunction set aside is that the Court was of the opinion that *inter alia* in the face of the undertaking in damages given by the plaintiff there should be an injunction having in mind that in the event the plaintiff fails in the substantive action the defendant may fall back on the undertaking in damages in respect of any damages it may have suffered as a result of the injunction.

In *Ushers Brewery Ltd. v. P.S. King & Co. (Finance) Ltd.* [1972] 1 Ch 148 Plowman J referred to *Newby v. Harrison* [1861] 3 De GF & J 287 and *Griffith v. Blake* [1884] 27 Ch D 474 in concluding at p. 154 that it was his judgment that "an inquiry as to damages will not be ordered in these case until either the plaintiff has failed on the merits at the trial or it is established before the trial that the injunction ought not to have been granted in the first instance."

Spry 3rd Ed. puts it this way at p. 465:

> The purpose of requiring an undertaking is simple to enable the Court, should it think that the justice of the case requires it, to recompense a person who has been temporarily enjoined, and, as it subsequently proves, enjoined contrary to his rights as finally ascertained, for the damage that he has meanwhile suffered.

At the hearing for an interlocutory injunction the Court is not called upon to decide the substantive issues. The decision on that is postponed until the final hearing. And the position the Court takes is that it is only just that the applicant should bear the risk that those questions could be decided against him.

Encik Murthi asks what happens if the plaintiff is unsuccessful in obtaining the interlocutory injunction but succeeds in the substantive action. The answer to that is that if the defendant pursues with a wrong, doing what he is not entitled to do, the plaintiff would have a cause of action in damages against the defendant.

Encik Murthi applied for an Erinford injunction. He pointed out that the Court should not rule out the possibility that the Supreme Court may take a different view to that taken at first instance and I think for the 3rd time reminded the Court that he had offered the various deponents of the affidavits to be cross-examined. I pause to state that since the plaintiff has chosen to rest its case on affidavit evidence - after all it was the plaintiff who decided to have the issues here tried by originating summons instead of by writ - it could not be heard to say that relevant evidence in favour of the plaintiff could have been obtained if only the defendants had cross-examined those deponents whose affidavit has been filed by the plaintiff!

Encik Murthi drew attention to alternative remedies at common law being available to the defendant and of other securities that had been provided and could be provided by the plaintiff and related companies of the plaintiffs and the directors of the various companies in the group.

However, it is on record that in a suit filed by the bank seeking common law remedies defences have been filed denying liability for the amounts claimed. As to securities provided, security given in the form of a 3rd party charge has the chargor in Court in Seremban seeking a declaration that the charge is null and void. As to a security given in the form of a purported assignment by one George Lim of RM2 million which he says is owed to him by a company called Asiavest, Asiavest's solicitors have written to the parties taking issue in respect of the validity of the assignment. So much for the alternative remedies.

As to various companies in the group and the directors of those companies coming forward to provide undertakings, there is nothing to show the financial standing of any of those companies or its directors. On the other hand, there is any amount of evidence that the group as a whole is in dire financial straits. Further Encik Murthi has made it clear that his instructions are that his clients are only prepared to provide security for damages limited to an amount equivalent to interest at 11 or 12% per annum on RM6 million for the period that

it takes for the Supreme Court to dispose of the appeal. What if between now and the hearing of the appeal the assets of the plaintiff company is depleted and there is nothing left for the Bank? What is the present financial position of the plaintiff? The answers to these questions are relevant but not available.

EnciK Murthi says that the credibility of the plaintiff company and its standing in the business community would be finished if receivers and managers are appointed. However, it is a fact that there has been a petition to wind up the plaintiff presented. It is contended that the plaintiff owes no money to the petitioner. But there are some 15 creditors supporting the petition! In any event *inter alia* with the petition and the notices published by the defendant in 4 newspapers in connection with the crystallization of the debenture and the present proceedings itself in open Court, it is incredulous that the question of the standing and credibility of the plaintiff company is raised. If ever anything was academic, that is.

Also found at [1987] 2 CLJ 458